

Michigan Law Review

Volume 118 | Issue 3

2019

A Post-Spokeo Taxonomy of Intangible Harms

Jackson Erpenbach

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Consumer Protection Law Commons](#), [Legal Remedies Commons](#), [Supreme Court of the United States Commons](#), and the [Torts Commons](#)

Recommended Citation

Jackson Erpenbach, *A Post-Spokeo Taxonomy of Intangible Harms*, 118 MICH. L. REV. 471 (2019).
Available at: <https://repository.law.umich.edu/mlr/vol118/iss3/4>

<https://doi.org/10.36644/mlr.118.3.post-spokeo>

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

NOTE

A POST-SPOKEO TAXONOMY OF INTANGIBLE HARMS

Jackson Erpenbach*

Article III standing is a central requirement in federal litigation. The Supreme Court's Spokeo decision marked a significant development in the doctrine, dividing the concrete injury-in-fact requirement into two subsets: tangible and intangible harms. While tangible harms are easily cognizable, plaintiffs alleging intangible harms can face a perilous path to court. This raises particular concern for the system of federal consumer protection laws where enforcement relies on consumers vindicating their own rights by filing suit when companies violate federal law. These plaintiffs must often allege intangible harms arising out of their statutorily guaranteed rights. This Note demonstrates that Spokeo's standard for what constitutes a cognizable intangible harm has produced inconsistent and arbitrary results in such lower court cases. Courts have come to varying conclusions about which intangible harms are sufficiently concrete to confer standing under the Court's new standard. This Note makes two contributions. First, it offers a novel taxonomy of these various intangible harms, sorted into five discrete categories. Once these categories are identified, the underlying inconsistencies, both between circuits and between similar consumer protection laws, become evident. Second, it proposes an approach to intangible harms that is more deferential to the judgment of Congress as revealed in its statutes.

TABLE OF CONTENTS

INTRODUCTION.....	472
I. BACKGROUND	474
A. <i>The Development of Standing Doctrine</i>	474
B. <i>Spokeo and the Concrete Injury Requirement</i>	476
C. <i>Intangible Harms</i>	478
II. THE DUTTA–LONG CIRCUIT SPLIT.....	480
III . CATEGORIES OF INTANGIBLE HARMS.....	483
A. <i>Privacy Harms</i>	484

* J.D. Candidate, May 2020, University of Michigan Law School. I am indebted to Professor Nicholas Bagley and Professor Julian Davis Mortenson as well as Aviv Halpern and the Notes Office for their helpful comments, critiques, and edits. I am also deeply grateful for my family and Katherine for their patience and support.

1. Invasion of Privacy	484
2. Intrusion upon Seclusion	486
3. Breach of Confidence	486
B. <i>Personal and Property Torts</i>	487
1. Defamation and Slander	487
2. Infliction of Emotional Distress	488
3. Trespass to Chattels.....	489
4. Implied Bailment	490
C. <i>Pecuniary Costs</i>	490
D. <i>Risks of Harm</i>	493
E. <i>Informational Injuries</i>	497
IV. PROPOSING DEFERENCE TO CONGRESS.....	499
CONCLUSION	506

INTRODUCTION

To bring a claim in federal court, plaintiffs must satisfy the standing requirement found in Article III's "case" or "controversy" language.¹ Over time, the Court has refined standing doctrine by framing it in terms of three neat, formalist elements: injury in fact, causation, and redressability.² The Court's articulation of standing has provided additional clarification for parties but has also raised new questions regarding the doctrine's limits.³ Because of standing's threshold nature, resolving these questions has consequences for countless federal cases.⁴

One area of significant controversy is what constitutes a cognizable injury in fact. Without one, a plaintiff cannot file suit in federal court. In the past, the Supreme Court has described cognizable injuries as "concrete and particularized, . . . 'actual or imminent, [and] not 'conjectural' or 'hypothetical.' " " ⁵ Until the Court's 2016 decision in *Spokeo, Inc. v. Robins*, lower courts generally treated the "concrete and particularized" language as one requirement: particularized injuries were presumed to be sufficiently con-

1. U.S. CONST. art. III, § 2.

2. See *infra* Section I.A.

3. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988); Gene R. Nichol, Jr., *Standing for Privilege: The Failure of Injury Analysis*, 82 B.U. L. REV. 301, 304 (2002); Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 169 (1992).

4. See *Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("This is the threshold question in every federal case, determining the power of the court to entertain the suit.").

5. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)).

crete.⁶ But in *Spokeo*, the Court made clear that concreteness is a separate, necessary requirement for a cognizable injury in fact.⁷

Yet *Spokeo* only further confused standing doctrine. The Court held that a plaintiff raising a statutory violation under a private right of action must have suffered some concrete injury beyond the mere violation.⁸ In doing so, the Court created new distinctions in the doctrine, dividing tangible from intangible harms, and “bare procedural violation[s]” from “risk[s] of real harm.”⁹ The interplay between *Spokeo* and the doctrine’s constitutional nature has created significant confusion in the lower courts.¹⁰ A confused jurisprudence could, as Justice Harlan feared, reduce “constitutional standing to a word game played by secret rules.”¹¹

A confused standing doctrine is especially troubling in the area of consumer protection because it may prevent consumers from vindicating their interests in a federal forum.¹² The modern patchwork of federal laws can be a powerful tool for consumer interests.¹³ Yet since its inception, the system has been underfunded and underenforced.¹⁴ As a result, federal consumer protection statutes are heavily reliant upon private rights of action to police bad behavior.¹⁵ Private right of action provisions enable consumers wronged by fraudulent business practices to vindicate their rights by acting as their own “private attorneys general.”¹⁶ Crucially, standing doctrine limits the reach of

6. See 136 S. Ct. 1540, 1548 (2016).

7. *Spokeo*, 136 S. Ct. at 1548; see also *id.* at 1555 (Ginsburg, J., dissenting) (observing that *Spokeo* was the first case to explicitly “discuss the separate offices of the terms ‘concrete’ and ‘particularized.’”).

8. *Id.* at 1549 (majority opinion).

9. *Id.*

10. See *infra* Parts II–III.

11. *Flast v. Cohen*, 392 U.S. 83, 129 (1968) (Harlan, J., dissenting).

12. Consumer protection laws are “intended to protect the public as a whole, not just to provide rules for deciding private disputes.” Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 663–64 (2008).

13. See Kathleen S. Morris, *Expanding Local Enforcement of State and Federal Consumer Protection Laws*, 40 FORDHAM URB. L.J. 1903, 1904–05 (2013) (“The problem is not a lack of good law: federal and state legislatures have enacted far-reaching consumer protection statutes . . .”).

14. See Mark E. Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils*, 26 GA. ST. U. L. REV. 1147, 1165 (2010) (“During the Reagan administration . . . the political climate shifted and there were several developments that severely obstructed the expansion of consumer protection law.”); Morris, *supra* note 13, at 1905 (“[T]hese potentially powerful bodies of consumer protection law are woefully under-enforced.”).

15. See Budnitz, *supra* note 12, at 664.

16. See *id.* at 689 (“Public consumer laws are intended to protect the general consumer population, but Congress recognized that government enforcement agencies lack the resources to ensure satisfaction of that goal. The private attorney general provisions can go far toward achieving that goal if other obstacles do not stand in the way.”).

such private rights of action.¹⁷ Because standing is constitutional, it cannot be statutorily conferred.¹⁸ How lower courts apply *Spokeo*, then, has enormous implications for the future of consumer protection statutes.

This Note argues that lower courts have applied the *Spokeo* standard for standing to certain consumer protection statutes in an overly strict and inconsistent fashion. Part I tracks the development of Article III standing from the original language of “cases” or “controversies” through the formulation of its modern three-part structure in *Lujan v. Defenders of Wildlife* to the Court’s decision in *Spokeo*. Part II introduces an active circuit split between the Third and Ninth Circuits, which concerns standing under the Fair Credit Reporting Act (FCRA), as a heuristic for subsequent discussion. Part III offers a novel taxonomy of intangible harms recognized by lower courts in applying the *Spokeo* analysis. Finally, Part IV provides a starting point for a more consistent standing doctrine through greater deference to congressional factfinding.

I. BACKGROUND

This Part briefly tracks the development of the Court’s modern standing doctrine, culminating in *Spokeo*’s “concrete injury” standard. Section I.A describes standing’s constitutional roots, with an emphasis on the Court’s influential *Lujan* decision. Section I.B provides the background for the Court’s 2016 *Spokeo* decision and its focus on concreteness. Section I.C explores the standard for intangible harms and highlights persistent ambiguities.

A. *The Development of Standing Doctrine*

Modern standing has its roots in Article III of the Constitution, which restricts the judicial branch’s authority to “cases” and “controversies.”¹⁹ These terms set familiar baselines: courts preside over legal disputes between adversarial parties that can be resolved with a decision.²⁰

But standing as a distinct constitutional doctrine did not gain significant force until the latter half of the twentieth century.²¹ Two primary justifications have shaped the doctrine. The first justification concerns separation of

17. See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

18. See *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009) (“[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.”).

19. U.S. CONST. art. III, § 2.

20. William Baude, *Standing in the Shadow of Congress*, 2016 SUP. CT. REV. 197, 198 (“It is black letter law that these terms require the case to be between the proper sorts of parties, ones who have some legal dispute that the court can resolve.”).

21. See Sunstein, *supra* note 3, at 169 (“In the history of the Supreme Court, standing has been discussed in terms of Article III on 117 occasions. Of those . . . nearly half . . . occurred after 1985 The explosion of judicial interest in standing as a distinct body of constitutional law is an *extraordinarily recent phenomenon*.” (emphasis added) (citations omitted)). Others contest Sunstein’s historical claims. E.g., Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 MICH. L. REV. 689, 691, 712 (2004).

powers: the case-or-controversy requirement ensures that courts retain their traditional role as adjudicators of live disputes and are not pushed into legislative or executive roles.²² The second is pragmatic: standing conserves judicial resources and ensures that consequential matters are brought by motivated plaintiffs.²³

Justice Scalia's *Lujan* opinion "significantly shift[ed] the law of standing" to its modern tripartite framework.²⁴ A plaintiff must first prove that she has suffered an injury in fact, defined as "an invasion of a legally protected interest which is [both] (a) concrete and particularized and (b) 'actual or imminent, not "conjectural" or "hypothetical."'"²⁵ Second, a plaintiff must show a "causal connection between the injury and the conduct complained of," and third, "it must be 'likely' . . . that the injury will be 'redressed by a favorable decision.'"²⁶

In laying out the modern elements of standing, *Lujan* also demonstrated the impact of the doctrine's constitutional roots. The case concerned a challenge to a federal regulation that restricted the reach of an Endangered Species Act (ESA) protection to within U.S. territory.²⁷ Plaintiffs challenged the regulation under the ESA's citizen-suit provision.²⁸ They alleged that the move risked the extinction of certain species abroad, which would cause aesthetic and vocational injuries to the plaintiffs.²⁹ But because the plaintiffs had no plans to even visit the habitats of the threatened species, the Court found no cognizable injury and dismissed plaintiffs' claim for lack of standing.³⁰

22. See, e.g., *FEC v. Akins*, 524 U.S. 11, 36 (1998) (Scalia, J., dissenting) ("If today's decision is correct, it is within the power of Congress to authorize any interested person to manage (through the courts) the Executive's enforcement of any law . . ."); Martin H. Redish & Sopan Joshi, *Litigating Article III Standing: A Proposed Solution to the Serious (but Unrecognized) Separations of Powers Problem*, 162 U. PA. L. REV. 1373, 1375 (2014).

23. See *Baker v. Carr*, 369 U.S. 186, 204 (1962); Joshua L. Sohn, *The Case for Prudential Standing*, 39 U. MEM. L. REV. 727, 737–42 (2009).

24. Sunstein, *supra* note 3, at 164–65, 198–99 ("*Lujan* may well be one of the most important standing cases since World War II. . . . Indeed, the decision ranks among the most important in history in terms of the sheer number of federal statutes that it apparently has invalidated.").

25. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citations omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). The Court first introduced the injury-in-fact requirement in 1970, shifting away from a previous requirement of legal injury. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152–53 (1970).

26. *Lujan*, 504 U.S. at 560–61 (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). This Note focuses exclusively on injury in fact's concreteness requirement.

27. *Id.* at 557–58.

28. 16 U.S.C. § 1540(g) (2012) ("[A]ny person may commence a civil suit on his own behalf . . . to enjoin any person . . . alleged to be in violation of any provision of this chapter . . .").

29. *Lujan*, 504 U.S. at 562–67.

30. *Id.* at 563–64, 578.

The Court rejected the claim that plaintiffs could establish standing via the ESA's citizen-suit provision without alleging an injury in fact.³¹ It reasoned that the statutory procedure in question must protect some "separate concrete interest," not a "generally available grievance about government."³² This established an important strand in the Court's standing jurisprudence: because standing is constitutional, Congress lacks the authority to disregard injury in fact.³³

Nevertheless, Congress still has a role to play in conferring standing, though that role is imprecise. The majority acknowledged the special nature of "procedural rights"³⁴ insofar as they justify loosening the standards for immediacy and redressability.³⁵ Justice Kennedy, in an influential concurrence, went a step further, observing that "Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."³⁶ The ESA's citizen-suit provision failed to do so, however, because it did not "identify the injury it seeks to vindicate and relate [it] to the class of persons entitled to bring suit."³⁷ Beyond these comments, however, Congress's authority to bestow standing lacked much-needed clarity.

B. Spokeo and the Concrete Injury Requirement

Spokeo picked up where *Lujan* left off and gave concreteness meaning independent of particularity. Thomas Robins filed suit against Spokeo, Inc., an online "people search engine" often used for background checks,³⁸ for violating the Fair Credit Reporting Act (FCRA).³⁹ Robins claimed that Spokeo listed false information—that he was married, had children, was in his 50s, was wealthy, and held a graduate degree—when Robins was actually

31. *Id.* at 572–73.

32. *Id.* "We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest . . ." *Id.* at 573 n.8.

33. *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009).

34. A procedural right is conferred by statute or regulation and entitles an individual to a particular process, like access to judicial review or information from the government. See Evan Tsen Lee & Josephine Mason Ellis, *The Standing Doctrine's Dirty Little Secret*, 107 NW. U. L. REV. 169, 174 n.21 (2012).

35. *Lujan*, 504 U.S. at 572 n.7.

36. *Id.* at 580 (Kennedy, J., concurring); see also *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

37. *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

38. *Online Background Reports*, SPOKEO, <https://www.spokeo.com/background-check> [<https://perma.cc/ACB9-HYPC>].

39. *Robins v. Spokeo, Inc.*, No. CV10–05306 ODW (AGRx), 2011 WL 597867, at *1 (C.D. Cal. Jan. 27, 2011), *rev'd*, 742 F.3d 409 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016). The FCRA imposes procedural requirements on credit agencies to ensure that consumer credit reports are accurate, fair, and utilized properly. 15 U.S.C. § 1681 (2012).

young, uneducated, and unemployed.⁴⁰ These inaccuracies were caused by Spokeo's alleged failure to comply with the FCRA's regulations for consumer reporting agencies, particularly the obligation to "follow reasonable procedures to assure maximum possible accuracy."⁴¹ The district court dismissed Robins's claim for want of a cognizable injury.⁴² The Ninth Circuit reversed, concluding that Robins's injury was both concrete and particular because his "personal interests in the handling of his credit information are individualized rather than collective."⁴³ The Supreme Court ultimately vacated and remanded, holding that the Ninth Circuit improperly found Robins's alleged procedural violation to be a concrete injury in fact.⁴⁴

The Court agreed that Robins's injury was sufficiently particular but found that the Ninth Circuit overlooked the concreteness requirement.⁴⁵ In so doing, the Court found that particularity alone is necessary but not sufficient for standing—"[a]n injury in fact must also be 'concrete.'"⁴⁶ The *Spokeo* Court further explained that an injury is concrete when it is "*de facto*"; . . . it must actually exist."⁴⁷ Concrete means "'real,' and not 'abstract.'"⁴⁸ But the Court clarified that "concrete" does not necessarily mean "tangible."⁴⁹ Rather, concrete injuries take two forms: tangible or intangible.⁵⁰ Tangible concrete injuries, the Court admitted, are "easier to recognize" than the intangible variety.⁵¹ In fact, commentators generally agree that tangibility is

40. See *Spokeo*, 136 S. Ct. at 1546.

41. 15 U.S.C. § 1681e(b) (2012) ("Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."). For examples of reasonable procedures that *Spokeo* could have implemented, see Lauren E. Willis, *Spokeo Mis-speaks*, 50 LOY. L.A. L. REV. 233, 236–37 (2017).

42. *Robins*, 2011 WL 597867, at *2.

43. *Robins v. Spokeo, Inc.*, 742 F.3d 409, 413 (9th Cir. 2014), *vacated*, 136 S. Ct. 1540 (2016).

44. *Spokeo*, 136 S. Ct. at 1550.

45. *Id.* at 1545.

46. *Id.* at 1548.

47. *Id.* (citing BLACK'S LAW DICTIONARY 479 (9th ed. 2009)).

48. *Id.* (quoting *Concrete*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabr. ed. 1971), and *Concrete*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabr. ed. 1967)).

49. *Id.* at 1549.

50. This choice of words contributes to doctrinal confusion. Concrete, for example, is defined as "tangible," suggesting an intangible entity is no longer concrete. *Concrete*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/concrete> [<https://perma.cc/3NZN-CXQE>]. Intangible is further defined as "an *abstract* quality or attribute." *Intangible*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/intangible> [<https://perma.cc/SK65-9Z87>] (emphasis added). See also Felix T. Wu, *How Privacy Distorted Standing Law*, 66 DEPAUL L. REV. 439, 454 (2017) ("These . . . tools of statutory construction . . . are entirely misplaced here because the phrase 'concrete and particularized' is . . . invented by the Court itself.").

51. *Spokeo*, 136 S. Ct. at 1549.

sufficient to establish concreteness.⁵² The more interesting question, and the focus of this Note, is which intangible injuries are sufficiently concrete for purposes of standing.

C. Intangible Harms

Spokeo does not affect standing for harms arising from violations of the Constitution.⁵³ To help identify intangible concrete injuries that are not constitutionally derived, the Court provided branching lines of inquiry for lower courts to puzzle through.⁵⁴ At bottom, an intangible injury is concrete if it is supported, to some indefinite degree, by history and the judgment of Congress, and the injury entails at least a risk of real harm to the plaintiff.⁵⁵

For cognizable intangible injuries, the Court directed that “both history and the judgment of Congress play important roles.”⁵⁶ The history component requires a court to inquire “whether an alleged intangible harm has a *close relationship* to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”⁵⁷ Use of the language “close relationship” is significant—it implies that courts should engage in a process of analogy but need not find a one-to-one analogue between a plaintiff’s alleged harm and the common law.⁵⁸

Further, the judgment of Congress “is also instructive and important” because “Congress is well positioned to identify intangible harms.”⁵⁹ The *Spokeo* Court referred back to *Lujan* and observed “that Congress may ‘elevat[e] to the status of legally cognizable . . . injuries that were previously inadequate,’”⁶⁰ and that it may “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed be-

52. See Craig Konnoth & Seth Kreimer, *Spelling Out Spokeo*, 165 U. PA. L. REV. ONLINE 47, 51–52 (2016) (“It appears that a ‘tangible’ injury is a sufficient but not a necessary condition for showing the constitutionally requisite ‘concrete’ injury in fact.”).

53. Though not every violation of a constitutional right confers standing, *Spokeo* does not appear to alter the Court’s method of vindicating constitutional injuries. See *id.* at 52–53. For example, the Court highlights two cognizable intangible injuries, violations of the right to free speech and right to free exercise, that are both constitutionally derived. *Spokeo*, 136 S. Ct. at 1549.

54. For an insightful flowchart of the *Spokeo* analysis, see Konnoth & Kreimer, *supra* note 52, at 62.

55. *Spokeo*, 136 S. Ct. at 1549.

56. *Id.*

57. *Id.* (emphasis added).

58. See *Susinno v. Work Out World Inc.*, 862 F.3d 346, 351 (3d Cir. 2017) (“[A] close relationship does not require that the newly proscribed conduct would ‘give rise to a cause of action under common law.’ But it does require that newly established causes of action protect essentially the same interests that traditional causes of action sought to protect.” (citation omitted) (quoting *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 639 (3d Cir. 2017))).

59. *Spokeo*, 136 S. Ct. at 1549.

60. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992)).

fore.”⁶¹ Yet the Court qualified that a statutory violation that is otherwise “divorced from any concrete harm”—termed “a bare procedural violation”—does not confer standing.⁶²

Congress’s judgment is especially relevant when a plaintiff’s alleged intangible injury manifests as a “risk of real harm.”⁶³ The *Spokeo* Court recognized that this “real harm” can be uncontroversially concrete even when “difficult to prove or measure,” such as in the case of slander per se.⁶⁴ Plaintiffs can invoke a congressionally granted procedural right—here, the right to enforce an accurate report—meant to protect the plaintiff from an intangible risk of harm without the “need [to] allege any *additional* harm beyond the one Congress has identified.”⁶⁵ As an example, the Court cited its line of cases that upheld standing when plaintiffs suffered various “informational injuries,” like voters who were denied information on campaign contributions to which they were statutorily entitled.⁶⁶ Some procedural violations are sufficiently concrete in themselves, while others require articulating a consequent risk of harm from the violation.⁶⁷

Though the majority opinion punted on the resolution of Robins’s standing by remanding the case, it provided two examples of procedural violations of the FCRA that would nevertheless fall short of a concrete injury.⁶⁸ First, Robins’s information could be entirely accurate but Spokeo simply failed to provide him statutorily required notice.⁶⁹ Though a procedural violation, this would not constitute an injury sufficient to confer standing. Second, his information could be inaccurate but trivially so.⁷⁰ For example, an “incorrect zip code” could not, “without more, . . . work any concrete

61. *Id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring)).

62. *Id.*

63. *Id.*

64. *Id.* (citing RESTATEMENT (FIRST) OF TORTS §§ 569–70 (AM. LAW INST. 1938)).

65. *Id.* (emphasis in original).

66. *Id.* (citing *FEC v. Akins*, 524 U.S. 11 (1998), and *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989)); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (granting standing to “tester” plaintiffs who were denied accurate information required by the Fair Housing Act). Informational injuries are further discussed *infra* Section III.E.

67. See Konnoth & Kreimer, *supra* note 52, at 56.

68. In her dissent, Justice Ginsburg largely agreed with the majority’s articulation of the law but concluded that Robins had already adequately alleged a concrete injury to his employment prospects. *Spokeo*, 136 S. Ct. at 1554–55 (Ginsburg, J., dissenting). “[M]isinformation about his education, family situation, and economic status . . . could affect his fortune in the job market,” a harm that the FCRA “aimed to prevent.” *Id.* at 1556. Justice Ginsburg also emphasized that the majority’s clear distinction between concreteness and particularity is a novel explanation of the Court’s standing doctrine. *Id.* at 1555.

69. *Id.* at 1550 (majority opinion).

70. *Id.*

harm.”⁷¹ Whether other inaccuracies were merely trivial or instead resulted in concrete injury became a question for the Ninth Circuit on remand.⁷²

The Court’s discussion of congressional judgment left lingering questions. First, little was said about the relationship between the dual factors of history and judgment. Is the test, for example, disjunctive or conjunctive? Here, some courts and commentators have adopted a disjunctive interpretation: an intangible injury may be concrete even if one of the two factors is not present.⁷³ Second, the Court did not explain how to identify Congress’s judgment nor how much weight it carries in the analysis. Here, lower courts have largely cohered around a two-step analysis first articulated by the Second Circuit in *Strubel v. Comenity Bank*.⁷⁴ The Ninth Circuit, in the remand of *Spokeo*, summarized the *Strubel* test as whether (1) the provision at issue was established to protect a plaintiff’s concrete interest and (2) the interest was actually at risk of harm in the case.⁷⁵

On remand, the Ninth Circuit again granted Robins standing.⁷⁶ In *Spokeo*’s wake, lower courts have struggled to adopt a consistent methodology for identifying intangible concrete injuries across a range of alleged violations of comparable consumer protection laws. This muddled jurisprudence is exemplified by the conflicting approaches that the Third and Ninth Circuit have embraced, which is the focus of Part II.

II. THE DUTTA–LONG CIRCUIT SPLIT

The divergent outcomes reached in *Dutta v. State Farm Mutual Insurance*⁷⁷ and *Long v. Southeastern Pennsylvania Transportation Authority*⁷⁸ demonstrate the lingering confusion left by *Spokeo*. Ambiguity remained not only for Robins’s particular claim on remand before the Ninth Circuit⁷⁹ but also for other violations of the FCRA and a host of similarly structured stat-

71. *Id.* This example has been criticized. See *infra* text accompanying notes 249–252.

72. *Spokeo*, 136 S. Ct. at 1550 n.8. The Ninth Circuit’s remanded opinion, *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018), is discussed *infra* Section III.B.

73. See *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1187 (11th Cir. 2019) (describing the two factors as “independent”); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017); *Konnoth & Kreimer*, *supra* note 52, at 62.

74. 842 F.3d 181, 190 (2d Cir. 2016) (“*Spokeo* . . . instruct[s] that an alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff’s concrete interests and where the procedural violation presents a ‘risk of real harm’ to that concrete interest . . .” (quoting *Spokeo*, 136 S. Ct. at 1549)); see also *Macy v. GC Servs. Ltd. P’ship*, 897 F.3d 747, 754–56 (6th Cir. 2018); *Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp.*, 879 F.3d 339, 344 (D.C. Cir. 2018); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 728 n.4 (7th Cir. 2016).

75. *Robins*, 867 F.3d at 1113.

76. *Id.* at 1118; see also *infra* Section III.B.1.

77. 895 F.3d 1166 (9th Cir. 2018).

78. 903 F.3d 312 (3d Cir. 2018).

79. *Robins*, 867 F.3d at 1118.

utes designed to protect consumer interests. This split between the Third and Ninth Circuits constitutes a meaningful issue for plaintiffs challenging violations of the FCRA disclosure requirements but also offers a useful heuristic for conceiving of intangible harms under *Spokeo*.

The FCRA regulates the use of credit reports for hiring and employment purposes.⁸⁰ An employer may, based on information in a properly obtained report, choose to take an “adverse action” against a current or prospective employee.⁸¹ Before taking such an adverse action, however, the employer must first provide the employee a copy of the report and an opportunity to respond.⁸² Though Congress’s most obvious concern was to correct inaccurate reports, the provision also allows the employee to “bring additional facts to the employer’s attention” and “present her side of the story ‘even where the facts are clear.’”⁸³ The Third and Ninth Circuits have split over whether failing to provide an employee a copy of her report constitutes a cognizable injury when there is no likelihood that presenting the employee’s side of the story will alter the ultimate outcome.

The Ninth Circuit in *Dutta* concluded that such a plaintiff lacks standing.⁸⁴ As part of its hiring process, State Farm obtained Bobby Dutta’s credit report in 2014.⁸⁵ After identifying issues in his credit history that disqualified him for the position, State Farm informed Dutta that he had been rejected.⁸⁶ Dutta was not provided an actual copy of his credit report, which contained several factual errors, until several days after he had been rejected.⁸⁷ Even after Dutta identified the report’s mistakes, however, State Farm again informed him that he had been rejected.⁸⁸ The Ninth Circuit denied Dutta standing for his claim under the FCRA because State Farm’s procedural violation did not ultimately harm Dutta.⁸⁹ Citing State Farm’s undisputed hiring policy, the court concluded that the accurate portions of his credit report “alone disqualified Dutta from” the position.⁹⁰ Because any inaccuracies that Dutta provided would be immaterial to his employment, his inability to explain them was not a concrete injury.⁹¹

80. 15 U.S.C. § 1681b (2012 & Supp. 2018).

81. *Id.* § 1681(b)(3).

82. *Id.* The employer must also provide “a description in writing of the rights of the consumer under this subchapter.” *Id.* § 1681b(b)(3)(A)(ii); *see also infra* Section III.E.

83. *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 696–97 (7th Cir. 2018) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985)).

84. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166 (9th Cir. 2018).

85. *Id.* at 1170.

86. *Id.*

87. *Id.*

88. *Id.* at 1170–71.

89. *Id.* at 1176.

90. *Id.*

91. *Id.*

The Third Circuit in *Long*, on the other hand, recognized standing for a similar situation. Three plaintiffs, each with prior drug convictions, applied for employment with the Southeastern Pennsylvania Transportation Authority (SEPTA).⁹² Though it first appeared that the plaintiffs had been successfully hired, SEPTA later informed each that they were not hired pursuant to SEPTA's "'categorical lifetime ban' on hiring anyone convicted of a [drug] crime."⁹³ Crucially, SEPTA did not provide the plaintiffs copies of their background checks before informing them of its decisions.⁹⁴ The plaintiffs filed an FCRA claim, arguing that, while their background checks were accurate, SEPTA nevertheless deprived them of their statutory right to review the reports and respond before an adverse action.⁹⁵ In recognizing standing, the Third Circuit insisted that "the FCRA does not condition the right to receive a consumer report on whether having the report would allow an individual to stave off an adverse employment action."⁹⁶

These conflicting outcomes stem from the courts' differing views of the interests protected by the FCRA's prior disclosure provision. Tellingly, the Ninth Circuit exclusively characterized the disclosure provision's purpose as correcting "false information" and providing "the opportunity to contest erroneous information."⁹⁷ The Third Circuit, however, adopted a broader view of the provision, going beyond merely ensuring the accuracy of reports.⁹⁸ Specifically, the Third Circuit identified four purposes served: "[A]ccuracy, relevancy, proper utilization, and fairness."⁹⁹ Even if the reports had been perfectly accurate, the plaintiffs were still deprived of a fair and transparent process that would have allowed them to present their side of the story. The Third Circuit also emphasized Congress's prophylactic aims, interpreting the FCRA's disclosure provision as serving important functions beyond the employment opportunity at issue.¹⁰⁰ For the plaintiffs in *Long*, the lack of prior disclosure, while not affecting their immediate employment at SEPTA, did have other repercussions. The court noted that prior disclosure allows "individuals to know beforehand when their consumer reports might be used

92. *Long v. Se. Pa. Transp. Auth.*, 903 F.3d 312, 316–17 (3d Cir. 2018).

93. *Id.* at 317 (quoting First Amended Class Action Complaint at ¶ 58, *Long v. Se. Pa. Transp. Auth.*, No. 2:16-cv-1991, 2017 WL 1332716 (E.D. Pa. Apr. 5, 2017)).

94. *Id.*

95. *Id.* If SEPTA is found to be noncompliant with the FCRA, the plaintiffs could recover statutory damages and attorneys' fees. 15 U.S.C. § 1681n(a) (2012).

96. *Long*, 903 F.3d at 319.

97. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1174–75 (9th Cir. 2018).

98. *Long*, 903 F.3d at 318 ("[T]he statute confers a broader right than simply to be free from adverse action based on inaccurate information.").

99. *Id.* at 319 ("The advance notice requirement, then, supports both accuracy and fairness.").

100. *See id.* at 318–19.

against them . . . either in the current job application process[] or going forward in other job applications.”¹⁰¹

These questions—What did Congress intend to accomplish with this statute? And how should the court characterize the injury in question?—are at the center of judicial disagreements after *Spokeo*. Beyond the FCRA, the enforcement of a host of other consumer protection statutes, including the Telephone Consumer Protection Act (TCPA),¹⁰² Fair and Accurate Credit Transactions Act (FACTA),¹⁰³ and the Fair Debt Collection Practices Act (FDCPA),¹⁰⁴ depends on how lower courts treat Congress’s judgment and characterize plaintiffs’ harm.

III. CATEGORIES OF INTANGIBLE HARMS

Spokeo has affected consumer protection laws unevenly.¹⁰⁵ For example, while it risks extinguishing claims arising under FACTA, claims under TCPA are virtually unimpeded.

Having little Supreme Court guidance, lower courts have identified numerous harms when analyzing a plaintiff’s intangible yet concrete injury. This Note analyzes and categorizes the intangible harms recognized by lower courts into five categories.

1. Privacy harms, both those resulting from distribution of plaintiffs’ personal information to third parties as well as claims of intrusion upon seclusion and breach of confidence when third parties are absent.
2. Personal and property torts in which courts have analogized claims of slander, infliction of emotional distress, and several property interests to modern statutory violations.
3. Pecuniary costs that consist of financial harms suffered by plaintiffs.
4. Risks of harm that plaintiffs may suffer from a statutory violation, especially identity theft or potentially fraudulent debt collection.
5. Informational injuries that plaintiffs have suffered by being denied statutorily guaranteed information necessary to exercise some substantive right.

101. *Id.* at 319. The Third Circuit also noted that SEPTA’s argument has a degree of circularity to it, as “the consumer cannot know whether his report is accurate unless it is disclosed to him.” *Id.*

102. Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended in scattered sections of 47 U.S.C.).

103. Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as amended in scattered sections of U.S.C.).

104. Pub. L. No. 95-109, 91 Stat. 875 (1977) (codified as amended at 15 U.S.C. §§ 1692–1692p (2012)).

105. This Note will focus on the FCRA, FACTA, TCPA, and FDCPA, using other statutes to draw comparisons.

As this Part demonstrates, these categories are not fixed, but they nevertheless provide a starting point for assessing the state of the doctrine.¹⁰⁶

A. Privacy Harms

In these cases, plaintiffs allege that defendant's statutory violation resulted in a concrete injury to their privacy interests by revealing identifying, often sensitive, information about the individual or by entering the plaintiff's personal space.¹⁰⁷ Courts have identified three variants on this core claim: a "traditional" invasion of privacy through dispersion of identifying information,¹⁰⁸ intrusion upon a plaintiff's seclusion,¹⁰⁹ and breach of confidence.¹¹⁰ Distinguishing between these categories can be difficult, and much turns on the individual judges' characterization of the harm.

1. Invasion of Privacy

Under *Spokeo*'s first factor for intangible harms, courts have identified a robust historical basis on which plaintiffs may allege privacy harms. For example, in *Eichenberger v. ESPN, Inc.*, the Ninth Circuit considered an alleged violation of the Video Privacy Protection Act (VPPA) resulting from sharing customers' information with a third party.¹¹¹ The court identified a historical corollary to the alleged harm, observing that "[v]iolations of the right to privacy have long been actionable at common law."¹¹² Applying this common law conception to modern concerns about individuals' information, the court continued that "both the common law and the literal understanding of privacy encompass the individual's control of information concerning his or her person."¹¹³ The Third Circuit similarly identified privacy harms as a distinct injury. In *In re Horizon Healthcare Services Inc. Data Breach Litigation*, concerning release of information in violation of the FCRA, Judge Schwartz's

106. "It's difficult, we recognize, to identify the line between what Congress may, and may not, do in creating an 'injury in fact.' Put five smart lawyers in a room, and it won't take long to appreciate the difficulty of the task at hand." *Hagy v. Demers & Adams*, 882 F.3d 616, 623 (6th Cir. 2018).

107. See RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977).

108. Personal information could include "names, dates of birth, marital statuses, genders, occupations, employers, Social Security numbers, and driver's license numbers." *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 386 (6th Cir. 2016). But not all identifiable information is necessarily private. Cf. *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 n.3 (3d Cir. 2017) ("[A] party does not satisfy the concreteness analysis 'simply by appending the word 'privacy' to her allegation.'" (quoting Brief of *Amicus Curiae* the Chamber of Commerce of the U.S. in Support of Defendant-Appellee at 14, *Susinno*, 862 F.3d 346 (No. 16-3277))).

109. See RESTATEMENT (SECOND) OF TORTS § 652B.

110. See RESTATEMENT (FIRST) OF TORTS § 757 (AM. LAW INST. 1938).

111. 876 F.3d 979, 981–82 (9th Cir. 2017).

112. *Eichenberger*, 876 F.3d at 983.

113. *Id.* (quoting *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 763 (1989)).

concurring opinion clarified that an individual's injury premised on a privacy interest is sufficient even without an injury tied to economic loss.¹¹⁴ Privacy on its own has "sufficient historical roots to satisfy . . . concrete harm for standing purposes."¹¹⁵

Courts have also found that invasion of privacy satisfies *Spokeo*'s second factor: the judgment of Congress. Courts inquire, on a statute-by-statute basis, whether Congress intended the procedural requirement in question to safeguard an individual's privacy interest. For example, courts have held that the VPPA¹¹⁶ and the FCRA¹¹⁷ both include procedural requirements calibrated to prevent privacy injuries.

Eichenberger and *Horizon Healthcare* invoked a distinction that separates viable privacy injuries from nonviable ones: the personal information in question must be disseminated.¹¹⁸ The centrality of dissemination in privacy harms is demonstrated in a D.C. Circuit opinion.¹¹⁹ In that case, four truck drivers sued the Department of Transportation because its database listed inaccurate information about them in violation of the FCRA.¹²⁰ The court recognized standing for the two truckers whose information had been shared with third parties, but not for the two whose information had remained in the department's control.¹²¹ This distinction is grounded in both history and the judgment of Congress. First, the court observed that there is "no historical or common-law analog where the mere existence of inaccurate information, absent dissemination, amounts to concrete injury."¹²² Second, the court recognized that "the harm Congress was concerned about was the *dissemination* of inaccurate information, not its mere *existence*."¹²³

114. 846 F.3d 625, 643 (3d Cir. 2017) (Shwartz, J., concurring).

115. *Horizon*, 846 F.3d at 642.

116. *Eichenberger*, 876 F.3d at 983 (concluding that "the VPPA provision at issue here[] codifies a context-specific extension of the *substantive* right to privacy").

117. *Horizon*, 846 F.3d at 639 ("[W]ith the passage of FCRA, Congress established that the unauthorized dissemination of personal information by a credit reporting agency causes an injury in and of itself . . .").

118. See *Eichenberger*, 876 F.3d at 981–82; *Horizon*, 846 F.3d at 638 ("'[U]nauthorized disclosures of information' have long been seen as injurious." (quoting *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 274 (3d Cir. 2016))).

119. *Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339 (D.C. Cir. 2018).

120. *Id.* at 340. DOT was obligated to comply with the FCRA. 49 U.S.C. § 31150(b)(1) (2012).

121. *Owner-Operator Indep. Drivers Ass'n*, 879 F.3d at 345, 347.

122. *Id.* at 344–45.

123. *Id.* at 345. Claims under the Cable Communications Policy Act similarly demonstrate the centrality of dissemination in privacy claims. See *Gubala v. Time Warner Cable, Inc.*, 846 F.3d 909, 912 (7th Cir. 2017) ("[T]here is no indication of any violation of the plaintiff's privacy because there is no indication that Time Warner has released, or allowed anyone to disseminate, any of the plaintiff's personal information . . ."); *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925, 930 (8th Cir. 2016).

2. Intrusion upon Seclusion

A second variant of an individual's privacy interest is the harm of intrusion upon seclusion.¹²⁴ Unlike the invasion-of-privacy harms, these cases involve intrusions into a person's space. Courts have most often identified this harm in cases arising under the TCPA in which defendants called or otherwise messaged individuals without their consent.¹²⁵ For example, in *Van Patten v. Vertical Fitness*, the Ninth Circuit held that unsolicited text messages sent to the plaintiff satisfied the concrete injury requirement.¹²⁶ Invoking *Spokeo*'s two factors, history and the judgment of Congress, the court observed that "[a]ctions to remedy defendants' . . . intrusion upon seclusion, and nuisance have long been heard by American courts" and, further, that "Congress sought to protect consumers from the unwanted intrusion and nuisance of unsolicited telemarketing phone calls and fax advertisements."¹²⁷ The Third Circuit reached the same conclusions in the context of unsolicited phone calls.¹²⁸ District courts have almost uniformly reached the same conclusion when presented with similar facts.¹²⁹

3. Breach of Confidence

The third privacy variant is harm resulting from a breach of confidence—a holder of data violates a legal duty to refrain from disclosing spe-

124. See *Susinno v. Work Out World Inc.*, 862 F.3d 346, 352 n.3 (3d Cir. 2017) ("[I]ntrusion upon seclusion is a well-recognized subset of common law invasion of privacy."). It is unclear whether businesses can invoke rights to privacy or seclusion. Compare *Fauley v. Drug Depot, Inc.*, 204 F. Supp. 3d 1008, 1011–12 (N.D. Ill. 2016) ("[B]ecause businesses do not have privacy interests in seclusion or solitude, Fauley's allegation that the fax, that was sent to his business, constitutes an invasion of privacy does not allege injury as required under Article III." (citations omitted)), with *Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 250 F. Supp. 3d 354, 357 n.1 (D. Minn. 2017) (observing that courts have reached opposing conclusions).

125. 47 U.S.C. § 227(b) (2012 & Supp. 2018). Courts have also analogized violation of the VPPA to intrusion upon seclusion. See, e.g., *Perry v. Cable News Network, Inc.*, 854 F.3d 1336, 1341 (11th Cir. 2017).

126. *Van Patten v. Vertical Fitness Grp., LLC.*, 847 F.3d 1037, 1043 (9th Cir. 2017) ("Unsolicited telemarketing phone calls or text messages, by their nature, invade the privacy and disturb the solitude of their recipients.").

127. *Id.*

128. *Susinno*, 862 F.3d at 351 ("The TCPA addresses itself directly to single prerecorded calls from cell phones, and states that its prohibition acts 'in the interest of [] privacy rights.'" (alteration in original) (quoting 47 U.S.C. § 227(b)(2)(C))).

129. See, e.g., *McCall Law Firm, PLLC v. Crystal Queen, Inc.*, 335 F. Supp. 3d 1124, 1131 (E.D. Ark. 2018); *A.D. ex rel. Serrano v. Credit One Bank, N.A.*, No. 14 C 10106, 2016 WL 4417077, at *6 (N.D. Ill. Aug. 19, 2016), *rev'd on other grounds*, 885 F.3d 1054 (7th Cir. 2018); *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 645–46 (N.D. W. Va. 2016) ("In essence, the TCPA can be seen as merely liberalizing and codifying the application of this common law tort to a particularly intrusive type of unwanted telephone call.").

cific information provided by the consumer.¹³⁰ Unlike a traditional privacy tort, there is no third-party requirement.¹³¹ Instead, “the harm from a breach of confidence occurs when the plaintiff’s trust in the breaching party is violated.”¹³² This theory is not commonly used but has been endorsed by the Eleventh and D.C. Circuits.¹³³ *Muransky v. Godiva Chocolatier, Inc.* analogized the defendant-business’s practice of printing ten digits of a plaintiff’s credit card number on customer receipts, in violation of FACTA,¹³⁴ to a breach of confidence because the information was “not kept confidential.”¹³⁵

B. *Personal and Property Torts*

Courts have also identified theories of standing premised on historical torts to persons and property, including harm to reputation via defamation and slander, emotional harm, and traditional property torts of trespass to chattels and implied bailment.

1. *Defamation and Slander*

The first tortious harms are defamation and slander. The Ninth Circuit’s reconsideration of *Spokeo* on remand typifies these injuries.¹³⁶ First, the court stated that the FCRA’s prohibition on inaccurate credit reports was intended to protect individuals’ concrete interests.¹³⁷ Second, it analogized Robins’s inaccurate report to “reputational and privacy interests that have

130. Alicia Solow-Niederman, *Beyond the Privacy Torts: Reinvigorating a Common Law Approach for Data Breaches*, 127 YALE L.J.F. 614, 624 (2018).

131. *Id.* at 620, 629 (“The privacy torts also face a conceptual hurdle because their emphasis on public exposure of private information is misplaced in the data breach context.” (footnote omitted)).

132. *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1190 (11th Cir. 2019).

133. *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1209 & n.2 (11th Cir. 2018) (citing Solow-Niederman, *supra* note 130), *vacated*, 922 F.3d 1175 (11th Cir. 2019); *see* Jeffries v. Volume Servs. Am., Inc., 928 F.3d 1059, 1064–65 (D.C. Cir. 2019). *But see* *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 118 (3d Cir. 2019) (“[W]e do not believe a breach of confidence action is sufficiently analogous absent third-party disclosure.”).

134. 15 U.S.C. § 1681c(g)(1) (2012). *See* additional discussion of FACTA *infra* Section III.D.

135. *Muransky*, 922 F.3d at 1191 (11th Cir. 2019) (“A consumer provides a merchant with his credit card number with the expectation that it will remain secret . . . FACTA gives legal protection to that confidentiality interest by permitting merchants to print only the last five digits of a credit card number.”); *see also* Solow-Niederman, *supra* note 130, at 625 (“[G]iven their relationship to consumers, the holders of consumer data in commercial transactions should be labeled with a distinct term: *data confidants*.”).

136. *Robins v. Spokeo, Inc.*, 867 F.3d 1108 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

137. *Id.* at 1113–14 (citing 15 U.S.C. § 1681e(b) (“[G]iven the ubiquity and importance of consumer reports in modern life . . . the real-world implications of material inaccuracies in those reports seem patent on their face. . . . [T]he legislative record includes pages of discussion of how such inaccuracies may harm consumers . . .”).

long been protected in the law,” particularly when defamatory statements relate to a person’s business.¹³⁸ Importantly, these historical actions required no evidence of actual harm suffered by the plaintiff.¹³⁹ Finally, Robins’s inaccuracies were not trivial but risked “real harm” because of the importance of credit reports to employers.¹⁴⁰

Courts have made two additional observations about slander as an injury. First, as with privacy harms, historical torts of libel or slander per se “require evidence of *publication*” or dissemination to third parties.¹⁴¹ Second, any slanderous information must be harmful; trivial inaccuracies are not sufficient.¹⁴² As the Ninth Circuit stated, not “every inaccuracy in these categories . . . will necessarily establish concrete injury.”¹⁴³

2. Infliction of Emotional Distress

The second tortious theory confers standing to plaintiffs that suffered emotional distress as a result of a statutory violation.¹⁴⁴ In *Ben-Davies v. Blibaum & Associates*, the Fourth Circuit held that an erroneous statement of the amount that plaintiff owed¹⁴⁵ was a sufficiently concrete injury to confer standing because the plaintiff “‘suffered’ . . . actually existing intangible harms that affect her personally: ‘emotional distress, anger, and frustration.’”¹⁴⁶ Unlike other cases in which courts only mentioned emotional dis-

138. *Id.* at 1114 (citing RESTATEMENT (FIRST) OF TORTS § 570 (AM. LAW INST. 1938)).

139. *Id.* at 1114–15 (“Courts have long entertained causes of action to vindicate intangible harms caused by certain untruthful disclosures about individuals, and we respect Congress’s judgment that a similar harm would result from inaccurate credit reporting.”).

140. *Id.* at 1116–17 (listing “age, marital status, educational background, and employment history”). This resembles Justice Ginsburg’s dissent. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1556 (2016) (Ginsburg, J., dissenting).

141. *Owner-Operator Indep. Drivers Ass’n v. U.S. Dep’t of Transp.*, 879 F.3d 339, 344–45 (D.C. Cir. 2018).

142. *Robins*, 867 F.3d at 1117.

143. *Id.* at 1117 n.4.

144. *Ben-Davies v. Blibaum & Assocs., P.A.*, 695 F. App’x 674 (4th Cir. 2017).

145. The plaintiff sued under the FDCPA, which prohibits, in part, “[t]he false representation of . . . the character, amount, or legal status of any debt.” 15 U.S.C. § 1692e(2)(A) (2012). Here, the defendant allegedly “demand[ed] payment of an incorrect sum based on the calculation of an interest rate not authorized by law.” *Ben-Davies*, 695 F. App’x at 676.

146. *Ben-Davies*, 695 F. App’x at 676.

tress as one of several viable theories for standing,¹⁴⁷ the Fourth Circuit identified emotional distress as the plaintiff's sole basis for standing.¹⁴⁸

3. Trespass to Chattels

A third tort-based theory of intangible harm relates to the plaintiff's property interests and has arisen in the context of the TCPA.¹⁴⁹ *Mey v. Got Warranty, Inc.*, a district court case, applied the historical tort of trespass to chattels when it held that the defendant's telemarketing robocalls had utilized the plaintiff's phone without permission.¹⁵⁰ Invoking this historical tradition as well as Congress's view of the matter, the court observed:

[T]he TCPA can be viewed as merely applying this common law tort to a 21st-century form of personal property and a 21st-century method of intrusion. Applying this ancient tort to these calls . . . is particularly appropriate since electronic intrusion is so much easier, and so much more readily repeated, than physical misuse of a chattel.¹⁵¹

From a plaintiff's perspective, this theory carries the additional benefit of conferring standing “[e]ven if the consumer does not answer the call or hear the ring.”¹⁵² Though *Mey* provides the most explicit application of this tort to modern statutory violations, the court noted that it is not the first to consider the analogy to modern technology.¹⁵³

147. See, e.g., *Vanamann v. Nationstar Mortg., LLC*, 735 F. App'x 260, 261 (9th Cir. 2018); *Church v. Accretive Health, Inc.*, 654 F. App'x 990, 991 (11th Cir. 2016) (acknowledging that the plaintiff “was very angry” and “cried a lot” but ultimately recognizing standing on other theories); *Cabiness v. Educ. Fin. Sols., LLC*, No. 16-cv-01109-JST, 2016 WL 5791411, at *6 (N.D. Cal. Sept. 1, 2016) (“The additional harms alleged by Ms. Cabiness in her complaint—i.e. suffering ‘a large amount of stress and anxiety’ and being ‘concerned and upset by the constant calls’ . . . —are intangible.”).

148. See *Ben-Davies*, 695 F. App'x at 676 (identifying emotional distress “as a ‘direct consequence’ of” the FDCPA violation).

149. As previously noted, the TCPA prohibits various forms of phone calls and faxes without the recipient's consent. 47 U.S.C. § 227(b)(1)(A)(iii) (2012 & Supp. 2018).

150. 193 F. Supp. 3d 641, 646 (N.D. W. Va. 2016) (“The harm recognized by the ancient common law claim of trespass to chattels—the intentional dispossession of chattel, or the use of or interference with a chattel that is in the possession of another, is a close analog for a TCPA violation.”).

151. *Mey*, 193 F. Supp. 3d at 647.

152. *Id.*

153. *Id.* (“Courts have applied this tort theory to the very actions alleged here—unwanted telephone calls.”). Other district courts have followed *Mey*. See, e.g., *Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc.*, No. 16-cv-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017) (“The *Mey* court reasoned that ‘[t]he harm recognized by the ancient common law claim of trespass to chattels—the intentional dispossession of chattel, or the use of or interference with a chattel that is in the possession of another, is a close analog for a TCPA violation.’” (quoting *Mey*, 193 F. Supp. 3d at 646)); *Martinez v. TD Bank USA, N.A.*, 225 F. Supp. 3d 261, 270 (D.N.J. 2016).

4. Implied Bailment

Plaintiffs can also allege standing based on the common law claim for breach of an implied bailment agreement.¹⁵⁴ For example, in *Muransky*, the Eleventh Circuit compared the defendant-business's FACTA violation to older cases in which a merchant is entrusted with a customer's property and is held liable if the property is not returned in the required manner.¹⁵⁵ A business that accepts credit cards, then, is a bailee who must return sensitive card information without exceeding the limitations set by statute.¹⁵⁶ The court admitted that this theory is usually applied in the context of tangible property but nevertheless held that the analogy was close enough for Congress to use its power to create a cause of action.¹⁵⁷

C. Pecuniary Costs

Plaintiffs consistently establish standing when they allege the following batch of tangible harms—even when they border on the trivial. But ambiguity lingers as to where the precise divide between tangible and intangible harms lies.

The first group of cases arises under the TCPA, which prohibits various unsolicited phone calls and faxes.¹⁵⁸ Courts have granted standing for an array of pecuniary harms resulting from receiving unsolicited faxes, including the cost of keeping the fax machine turned on and the cost of paper and ink consumed.¹⁵⁹ Though unquestionably tangible, these harms amount to questionable costs. For example, *Florence Endocrine Clinic v. Arriva Medical* concerned a single medical form sent on four occasions.¹⁶⁰ Similarly, an

154. *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1209 (11th Cir. 2018), *vacated*, 922 F.3d 1175 (11th Cir. 2019); *see also* *McCloud v. Save-A-Lot Knoxville, LLC*, No. 3:18-cv-486, 2019 WL 2250269, at *11 (E.D. Tenn. May 24, 2019) (considering, but seemingly rejecting, a plaintiff's use of the implied bailment theory); *Bailey v. Six Flags Entm't Corp.*, No. 1:17-CV-03336-MHC-AJB, 2019 WL 2291895, at *6 (N.D. Ga. Feb. 12, 2019) (endorsing implied bailment as a basis for plaintiff's standing in a FACTA case).

155. *Id.*

156. *Id.* at 1210.

157. *Id.* at 1211. Justice Gorsuch, in his *Carpenter* dissent, similarly suggested that “ancient principles” of property may be applicable in “modern data cases.” *Carpenter v. United States*, 138 S. Ct. 2206, 2269 (2018) (Gorsuch, J., dissenting) (characterizing “your data” as “your modern-day papers and effects”). *But see* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000) (arguing against the analogy of personal data as property).

158. 47 U.S.C. § 227(b)(1) (2012 & Supp. 2018).

159. *See, e.g., Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017); *Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 250 F. Supp. 3d 354, 359 (D. Minn. 2017) (“Sandusky’s allegation that MedTox’s violation of the TCPA disrupted Sandusky’s business by tying up its fax line, wasted Sandusky’s paper and ink, and wasted the time of Sandusky’s employees is sufficient to establish standing.”).

160. *Florence Endocrine Clinic*, 858 F.3d at 1364–65.

influential pre-*Spokeo* decision in the Eleventh Circuit concluded that occupying a fax machine for even “one minute” was sufficient for standing.¹⁶¹

TCPA claims from unsolicited phone calls produce similar results. Plaintiffs have received standing because unsolicited calls drain a phone’s electricity, increase wear on a phone, and incur call or text charges.¹⁶² Here, again, the actual magnitude of harm is dubious; even a generous estimate of the cost of electricity involved amounts to spare change.¹⁶³ Further, courts have held that even a single unsolicited call is sufficient for standing purposes when plaintiffs invoke one of the above theories of harm.¹⁶⁴ Despite the relatively trivial nature of these harms, courts have repeatedly cited these arguments to grant standing under the TCPA.¹⁶⁵

Courts have identified two other financial harms: mitigation costs and reduced credit scores. First, in *Galaria v. Nationwide Mutual Insurance Co.*, the Sixth Circuit granted standing because the plaintiffs expended “reasonably incurred mitigation costs” in responding to defendant’s data breach that exposed the plaintiff to the risk of fraud.¹⁶⁶ Second, a lower credit score conferred standing in two cases. In *Evans v. Portfolio Recovery Associates*, the Seventh Circuit held that the plaintiff’s inaccurate credit rating, caused by an FDCPA violation, constituted an “appreciable risk of harm.”¹⁶⁷ The court reasoned that an inaccurate rating “produces a variety of negative effects”

161. *Palm Beach Golf Ctr.-Boca, Inc. v. John G. Sarris*, D.D.S., P.A., 781 F.3d 1245, 1251 (11th Cir. 2015).

162. *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 644–45 (N.D. W. Va. 2016) (“For consumers with prepaid cell phones . . . unwanted calls cause direct, concrete, monetary injury by depleting limited minutes that the consumer has paid for In addition, all ATDS calls deplete a cell phone’s battery, and the cost of electricity to recharge the phone is also a tangible harm. While certainly small, the cost is real, and the cumulative effect could be consequential.”); *Martinez v. TD Bank USA, N.A.*, 225 F. Supp. 3d 261, 270 (D.N.J. 2016) (similar).

163. Joshua Scott Olin, Note, *Rethinking Article III Standing in Class Action Consumer Protection Cases Following Spokeo v. Robins*, U. MIAMI BUS. L. REV., Winter 2017, at 69, 85 (“The iPhone . . . costs about twenty-five cents *per year* to charge. . . . *Mey* says that a quarter’s worth of damage, yearly, is enough to confer standing upon a plaintiff.”).

164. *Etzel v. Hooters of Am., LLC*, 223 F. Supp. 3d 1306, 1312 (N.D. Ga. 2016) (“Injuries that occur from a single call or text (whether from depleted battery life, wasted time, or annoyance) would be *de minimis*, according to Defendant. However, the language of the TCPA is clear that a violation can occur from a single call.”).

165. See *Casso’s Wellness Store & Gym, L.L.C. v. Spectrum Lab. Prods., Inc.*, No. 17-2161, 2018 WL 733216, at *5 (E.D. La. Feb. 6, 2018) (“[C]ourts subsequent to *Spokeo*[] have repeatedly held that allegations of wasted time in reviewing unsolicited fax advertisements and the use of paper and ink toner in printing those advertisements constitute concrete injuries as required to have Article III standing under the TCPA”); *Horton v. Sw. Med. Consulting, LLC*, No. 17-CV-0266-CVE-mjx, 2017 WL 2951922, at *3 n.3 (N.D. Okla. July 10, 2017) (collecting cases); *LaVigne v. First Cmty. Bancshares, Inc.*, 215 F. Supp. 3d 1138, 1146 (D.N.M. 2016) (“Regardless of how small the harm is, it is actual and it is real.”).

166. 663 F. App’x 384, 386, 388–90 (6th Cir. 2016).

167. 889 F.3d 337, 345 (7th Cir. 2018).

because of its ubiquitous use.¹⁶⁸ Similarly, the Eleventh Circuit cited the fact that the “[plaintiffs] credit score dropped 100 points” as evidence of harm caused by violation of the FCRA.¹⁶⁹

The final set of cases concerns wasted time caused by a defendant’s statutory violation. In TCPA phone cases, courts have granted standing because plaintiffs wasted time responding to unsolicited calls and texts.¹⁷⁰ Likewise, the Eleventh Circuit identified the time used resolving credit inaccuracies in an FCRA case¹⁷¹ and time spent destroying a receipt containing credit card number in a FACTA case as harms.¹⁷² These cases either labeled wasted time as “intangible”¹⁷³ or made no specific finding regarding tangibility.¹⁷⁴ In contrast, TCPA fax cases have explicitly classified “wast[ing] the time of [plaintiffs] employees” as a “tangible injury.”¹⁷⁵

As this survey of lower court decisions demonstrates, the Supreme Court’s attempt to clarify concreteness by dividing tangible and intangible harms was insufficient; the distinction remains blurry. Wasted time seems to be intangible when not acting as an employee but tangible once a frivolous fax is answered at work. Additionally, a court can characterize occupation of a physical object in intangible, tortious terms¹⁷⁶ or in terms of tangible maintenance costs.¹⁷⁷ Plaintiffs’ attorneys have cited multiple tangible hooks to avoid the morass of intangible harms, even by asserting a client’s printer ink bills or electricity costs. Courts’ comfort with monetary harms produces some uncomfortable results: a minuscule quantum of electricity consumed

168. *Evans*, 889 F.3d at 345 (emphasizing the use of credit reports by landlords and employers).

169. *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1280 (11th Cir. 2017).

170. *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 648 (N.D. W. Va. 2016); *see also* *Abante Rooter & Plumbing, Inc. v. Pivotal Payments, Inc.*, No. 16-cv-05486-JCS, 2017 WL 733123, at *7 (N.D. Cal. Feb. 24, 2017) (“Courts have also recognized that the time that is wasted as a result of TCPA violations constitutes concrete injury.”); *Etzel v. Hooters of Am., LLC*, 223 F. Supp. 3d 1306, 1312 (N.D. Ga. 2016) (“[S]urely Plaintiff’s battery was depleted and time was wasted while reading and responding to the text.”).

171. *Pedro*, 868 F.3d at 1280.

172. *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1192 (11th Cir. 2019) (“The effort [the plaintiff] put into doing away with the risky receipt would suffice for standing.” (citing *Pedro*, 868 F.3d at 1280)).

173. *See, e.g., Mey*, 193 F. Supp. 3d at 648 (“A final intangible harm that the illegal calls caused here is that they required the plaintiff to tend to them and wasted the plaintiff’s time.”).

174. *Muransky*, 922 F.3d at 1192; *Pedro*, 868 F.3d at 1280.

175. *Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc.*, 250 F. Supp. 3d 354, 357 & n.1 (D. Minn. 2017); *see also* *A.D. ex rel. Serrano v. Credit One Bank, N.A.*, No. 14 C 10106, 2016 WL 4417077, at *7 (N.D. Ill. Aug. 19, 2016), *rev’d on other grounds*, 885 F.3d 1054 (7th Cir. 2018) (referring to “tangible harms like wasted time . . . and financial losses”).

176. *See supra* Section III.B.3 (discussing trespass to chattels in the context of TCPA and intangible harms).

177. *See, e.g., Florence Endocrine Clinic, PLLC v. Arriva Med., LLC*, 858 F.3d 1362, 1366 (11th Cir. 2017).

receives universal endorsement as a harm while issues of privacy, consumer deception, and accurate information receive more exacting judicial scrutiny.

D. *Risks of Harm*

The next category of injuries consists of various risks of harm to plaintiffs resulting from statutory violations. *Spokeo* acknowledged that a “risk of real harm” can be sufficiently concrete.¹⁷⁸ Left unspecified, however, was the “degree of risk sufficient to meet” that requirement.¹⁷⁹ The role of risk in standing doctrine has been subject to extensive academic examination, particularly following the Court’s *Clapper v. Amnesty International* decision.¹⁸⁰ This Section will focus on two groups of cases: violations of FACTA that raise identity theft risks and violations of the FDCPA and TCPA that raise other miscellaneous risks.

Discussions of risk have played a prominent role in cases arising under FACTA, which regulates the display of customer credit card information on receipts.¹⁸¹ Specifically, no “business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder.”¹⁸²

District courts in the Eleventh Circuit have staked out a strict textual position. In *Guarisma v. Microsoft Corp.*, the defendant-business printed ten digits of the plaintiff’s credit card number.¹⁸³ The court first identified the purpose of FACTA’s procedural requirements as revealed in the legislative history, “finding [that] Congress desired to create a substantive legal right for consumers to utilize in protecting against identity theft.”¹⁸⁴ The court then held that the injury was concrete because “FACTA created a substantive legal right for . . . consumers to receive printed receipts truncating their personal credit card numbers, and thus protecting their financial information.”¹⁸⁵ The court in *Wood v. J Choo USA* went a step further by granting standing when the defendant merely printed the card’s expiration date but

178. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

179. *Id.* at 1550. In 2013, the Court alternately defined the requisite risk as “certainly impending” and “substantial.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 n.5 (2013).

180. 568 U.S. at 415; *see, e.g.*, Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737 (2018); Thomas Martecchini, Note, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After Clapper v. Amnesty International USA*, 114 MICH. L. REV. 1471 (2016).

181. 15 U.S.C. § 1681c(g) (2012).

182. *Id.* § 1681c(g)(1).

183. 209 F. Supp. 3d 1261, 1262 (S.D. Fla. 2016).

184. *Guarisma*, 209 F. Supp. at 1266.

185. *Id.* at 1267; *see also* *Altman v. White House Black Mkt., Inc.*, No. 1:15-cv-2451-SCJ, 2016 WL 3946780, at *6 (N.D. Ga. July 13, 2016) (citing “the Congressional creation of a right and injury, as well as the language of the Senate Report which indicates that Congress did not find the risk of identity theft to be speculative”).

otherwise complied with FACTA's last-five-digit requirement.¹⁸⁶ Finally, in its 2019 *Muransky* opinion, the Eleventh Circuit held that printing six additional card digits resulted in a concrete injury.¹⁸⁷

Several circuit courts have reached the opposite conclusion.¹⁸⁸ In each case, the FACTA violation at issue was, like in *Wood*, the printing of a customer's expiration date. In *Bassett v. ABM Parking Services*, the Ninth Circuit held that "it is difficult to see how issuing a receipt to *only* the card owner and with *only* the expiration date" constitutes a concrete injury, because the risk of identity theft is simply "too speculative."¹⁸⁹ It rejected the analogy of an expiration date to historical harms of privacy or defamation.¹⁹⁰ More importantly, the court concluded that the judgment of Congress, despite an explicit statutory prohibition, "weigh[ed] against Bassett" because a later amendment to FACTA clarified that "a disclosed expiration date by itself poses minimal risk."¹⁹¹ The Second and Seventh Circuits reached identical conclusions, both stressing that (1) an expiration date alone is insufficient for identity theft and (2) the receipts in question were not disclosed to third parties.¹⁹²

This factual distinction—that card digits may facilitate identity theft but that expiration dates certainly cannot—has produced a slippery slope, in which other lower courts claim to rely on this distinction to deny standing in cases arising out of fact patterns increasingly attenuated from *Bassett*. First, the Ninth Circuit denied standing to a plaintiff when the defendant in the case had printed an extra first digit of the plaintiff's credit card number, not an expiration date.¹⁹³ The court claimed to defer to Congress's expertise but concluded that, like *Bassett*, the receipt had not been distributed and that a card's first digit is irrelevant information because it "merely identifies the brand of the card."¹⁹⁴ The next case down the slope, *Katz v. Donna Karan*

186. *Wood v. J Choo USA, Inc.*, 201 F. Supp. 3d 1332 (S.D. Fla. 2016).

187. *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1192 (11th Cir. 2019). The court did not determine whether printing an expiration date alone would constitute a concrete injury. *Id.* at 1189 n.5.

188. *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir. 2018); *Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76 (2d Cir. 2017); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016).

189. *Bassett*, 883 F.3d at 783 (quoting *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 654 (9th Cir. 2017)).

190. *Id.* at 780–81 (observing that the receipt was never disclosed to a third party and that the interests in play do not resemble traditional privacy claims).

191. *Id.* at 781–82 ("Congress stressed that 'proper truncation of the card number . . . regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card fraud.'" (quoting the Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565, 1565 (2008))).

192. *Crupar-Weinmann*, 861 F.3d at 81–82; *Meyers*, 843 F.3d at 727–28 ("Congress has specifically declared that failure to truncate a card's expiration date, without more, does not heighten the risk of identity theft.").

193. *Noble v. Nev. Checker Cab Corp.*, 726 F. App'x 582, 584 (9th Cir. 2018).

194. *Id.*

Co., denied standing when the defendant printed ten digits of a consumer's credit card number.¹⁹⁵ *Katz* relied on the claim, not drawn from Congress, that ten digits of a credit card are also insufficient to steal the card's information and so cannot cause injury.¹⁹⁶

Citing these cases, a district court case that denied standing for a receipt with the plaintiff's *full* credit card number and expiration date marks the bottom of the slope.¹⁹⁷ The court in *Jeffries v. Volume Services America* concluded that the risk of identity theft was too speculative because no one else saw the receipt and the plaintiff's name was not on it.¹⁹⁸ To prevent credit fraud, the court recommended that the plaintiff "simply discard her receipt in a public trash can."¹⁹⁹ Left out of this analysis is (1) any reference to the statutory text or congressional findings and (2) any explanation for how Jeffries could file a claim after throwing away the only evidence relevant to the case.

Jeffries epitomizes the tendency of courts in FACTA cases to depart from explicit statutory language and congressional statements of purpose to constrict any plaintiff's ability to enforce the statute. Taken seriously, *Jeffries* renders the cornerstone of a piece of congressional legislation unenforceable by imposing constitutionally derived "dissemination," "name," and "trash can" requirements. Other court opinions told plaintiffs to "shred" their receipts.²⁰⁰ In minimizing plaintiffs' "speculative" identity theft harms, these courts simultaneously ignore the additional harms of anxiety about identity theft, time wasted responding to the risk, and costs of shredding.²⁰¹ In doing so, these cases create a notable discrepancy with cases arising under the FDCPA,²⁰² TCPA,²⁰³ and FCRA.²⁰⁴

195. 872 F.3d 114 (2d Cir. 2017); *see also* *Taylor v. Fred's, Inc.*, 285 F. Supp. 3d 1247 (N.D. Ala. 2018).

196. *Katz*, 872 F.3d at 118, 120.

197. *Jeffries v. Volume Servs. Am., Inc.*, 319 F. Supp. 3d 525, 527 (D.D.C. 2018), *rev'd and remanded*, 928 F.3d 1059 (D.C. Cir. 2019).

198. *Id.* at 531 ("[T]he receipt given to Plaintiff ended up with Plaintiff herself. She could have lost the receipt, or it could have been stolen Nor is there any allegation that the receipt also contained Plaintiff's name, which presumably would be necessary to make any use of a credit card number.").

199. *Id.* at 532.

200. *See, e.g.,* *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 783 (9th Cir. 2018) ("[Plaintiff] could shred the offending receipt along with any remaining risk of disclosure.").

201. The *Jeffries* plaintiff highlighted each of these theories to no avail. *Jeffries*, 319 F. Supp. 3d at 530. Notably, the Eleventh Circuit in *Muransky* emphasized the time and cost burdens from receiving an untruncated receipt. *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1192 (11th Cir. 2019).

202. *See* *Ben-Davies v. Blibaum & Assocs., P.A.*, 695 F. App'x 674 (4th Cir. 2017) (emotional distress).

203. *See, e.g.,* *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641 (N.D. W. Va. 2016) (discussing, among other harms, wasted time, electricity costs, and occupation of one's property).

204. *Galaria v. Nationwide Mut. Ins. Co.*, 663 F. App'x 384, 388 (6th Cir. 2016) (identifying "reasonably incurred mitigation costs" in responding to increased risk of fraud).

Ironically, *Jeffries* and similar opinions also highlight limitations on judicial factfinding. While these courts claim to closely scrutinize the facts of each case, they simultaneously appear to rely on outdated or incorrect facts. As the Eleventh Circuit observed, the claim that the first six digits of a credit card pose no risk of harm originates in a single expert report filed in a 2007 district court case.²⁰⁵ Subsequent court opinions recycled the finding, despite the very real possibility that technological developments in the intervening decade have invalidated the claim.²⁰⁶ Courts, then, have “transformed the fact-findings of a single district court into a bright-line, no-standing rule.”²⁰⁷

Courts have identified two other risks beyond incremental risk of identity theft. First, the Sixth Circuit in *Macy v. GC Services* held that failure to properly disclose the plaintiff’s rights under the FDCPA caused the harm of “greater risk of falling victim to ‘abusive debt collection practices.’”²⁰⁸ If a consumer followed the defendant’s faulty instructions, the court reasoned, they would waive the FDCPA’s protections.²⁰⁹ Second, the district court in *Mey* held that unsolicited calls prohibited by the TCPA “cause a risk of injury due to interruption and distraction.”²¹⁰ The resulting risk of automobile accidents, the court held, was a concrete injury.²¹¹

This category demonstrates that judges have significant discretion to frame a harm either as a *risk* of harm or as a tortious form of harm. For example, on remand of *Spokeo*, the Ninth Circuit analogized Robins’s injury to defamation, a tort that requires no specific harm.²¹² But its discussion of Robins’s reduced employment prospects also appeared to be premised on probabilities.²¹³ Given these two possible theories, the Ninth Circuit explicitly resisted a risk-based characterization of Robins’s harm.²¹⁴ The Third Circuit offers another example of choosing between a tort-based theory and a risk-based theory of harm. In *Horizon Healthcare* it chose to base the plain-

205. *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1213–14 (11th Cir. 2018) (citing *Bateman v. Am. Multi-Cinema, Inc.*, 252 F.R.D. 647, 651 (C.D. Cal. 2008), *rev’d*, 623 F.3d 708 (9th Cir. 2010)), *vacated*, 922 F.3d 1175 (11th Cir. 2019).

206. *Id.* at 1214.

207. *Id.* at 1213 (citing *Tarr v. Burger King Corp.*, No. 17-23776-CIV-MORENO, 2018 WL 318477 (S.D. Fla. Jan. 5, 2018)).

208. *Macy v. GC Servs. Ltd. P’ship*, 897 F.3d 747, 758 (6th Cir. 2018) (quoting 15 U.S.C. § 1692(e) (2012)). The court also framed this as “a risk of harm to the FDCPA’s goal of ensuring that consumers are free from deceptive debt-collection practices.” *Id.* at 757.

209. *Id.* at 758. Notably, the court did not connect such “abusive practices” to any financial harm. *Id.*

210. *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641, 649 (N.D. W. Va. 2016).

211. *Id.* (“[A] cell phone call is a common cause of automobile accidents . . .”).

212. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1114–15 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

213. *Id.* at 1117.

214. *Id.* at 1118 (“[T]his alleged intangible injury is itself sufficiently concrete. It is of no consequence how likely Robins is to suffer *additional* concrete harm as well (such as the loss of a specific job opportunity).”).

tiff's standing on a privacy harm rather than the harm of a risk of identity theft.²¹⁵

E. *Informational Injuries*

These last cases concern “informational injuries” that plaintiffs suffer from statutory violations.²¹⁶ According to the D.C. Circuit:

A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that . . . a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.²¹⁷

Informational injuries have been alleged in post-*Spokeo* consumer protection cases with varying levels of success. Primarily, informational injuries confer standing when defendants fail to disclose a plaintiff's rights under the FCRA or FDCPA.²¹⁸ For example, in *Syed v. M-I, LLC*, the Ninth Circuit granted standing because the defendant-employer provided the plaintiff with a disclosure document that did not “consist ‘solely’ of the disclosure,” a violation of the FCRA.²¹⁹ The FCRA disclosure provision furthered Congress's “overarching purposes of ensuring accurate credit reporting, promoting efficient error correction, and protecting privacy.”²²⁰ But excess information in the disclosure caused confusion, depriving the plaintiff of the ability to properly consider the waiver of his rights.²²¹ Similarly, the Sixth Circuit in *Macy* considered a provision of the FDCPA that requires debt collectors to

215. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 634–35 (3d Cir. 2017). The court observed later in the opinion that “[p]laintiffs make a legitimate argument that they face an increased risk of future injury, which at least weighs in favor of standing.” *Id.* at 639 n.19.

216. Plaintiffs have long enjoyed standing for informational injuries. See, e.g., *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74 (1982).

217. *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (concerning an unsuccessful suit for disclosure of information under the ESA).

218. Under the FCRA, “a person may not procure a consumer report . . . for employment purposes . . . unless . . . a *clear and conspicuous* disclosure has been made in writing to the consumer . . . before the report is procured . . . in a document that consists *solely* of the disclosure, that a consumer report may be obtained for employment purposes.” 15 U.S.C. § 1681b(b)(2)(A) (2012) (emphasis added). Under the FDCPA:

[A] debt collector shall . . . send the consumer a written notice containing . . . (4) a statement that if the consumer notifies the debt collector *in writing* . . . that the debt . . . is disputed, the debt collector will obtain verification of the debt . . . ; and (5) a statement that, upon the consumer's *written request* . . . the debt collector will provide the consumer with the name and address of the original creditor.

15 U.S.C. § 1692g(a) (2012) (emphasis added).

219. 853 F.3d 492, 498–500 (9th Cir. 2017).

220. *Syed*, 853 F.3d at 496–97.

221. *Id.* at 499.

inform consumers of their right to dispute the validity of the debt “in writing.”²²² Though the defendant–debt collector disclosed the plaintiff’s right to dispute the amount owed, it failed to specify that such complaints must be written.²²³ The court granted standing, citing an analogous injury of consumer confusion because a consumer that contested a debt by telephone instead of writing would forfeit the FDCPA’s protections.²²⁴ The Second Circuit drew a dividing line for granting standing under a disclosure provision of the Truth in Lending Act: a failure to disclose the *plaintiff’s* obligations is a concrete injury but a failure to disclose the defendant-lender’s obligations is not.²²⁵

But several circuits have denied standing under similar fact patterns. First, the Third Circuit in *Long* denied standing to a plaintiff on the claim that the defendant-employer failed to disclose, in writing, the plaintiff’s rights under the FCRA.²²⁶ Departing from the Sixth Circuit’s *Macy* opinion, the Third Circuit concluded that this failure to disclose caused no injury because “[p]laintiffs became aware of their FCRA rights and were able to file this lawsuit.”²²⁷ This circular reasoning defeats Congress’s purpose. By this logic, savvy employers should *never* disclose an employee’s rights because employees will either (a) fail to file suit because of their ignorance or (b) become aware of their rights another way and sue, only to be denied standing.

Second, the Seventh Circuit encountered facts very similar to the Ninth Circuit in *Syed*.²²⁸ In *Groshek v. Time Warner Cable*, the plaintiff received a disclosure document that, in violation of the FCRA, did not “consist[] *solely* of the disclosure.”²²⁹ Here, however, the Seventh Circuit denied standing because, unlike in *Syed*, the plaintiff “present[ed] no factual allegations plausibly suggesting that he was confused by the disclosure form.”²³⁰

Another informational injury arises when an employer fails to provide prospective employees with a copy of their credit report before taking adverse employment actions against them.²³¹ Denying information guaranteed

222. *Macy v. GC Servs. Ltd. P’ship*, 897 F.3d 747, 756 (6th Cir. 2018).

223. *Id.* at 751.

224. *Id.* at 758. The Eleventh Circuit reached a similar conclusion under a disclosure provision and, unlike the Sixth Circuit, explicitly invoked the language of a “right to information pursuant to the FDCPA.” *Church v. Accretive Health, Inc.*, 654 F. App’x 990, 994 (11th Cir. 2016).

225. *Strubel v. Comenity Bank*, 842 F.3d 181, 190, 194 (2d Cir. 2016).

226. *Long v. Se. Pa. Transp. Auth.*, 903 F.3d 312, 325 (3d Cir. 2018). Under the FCRA, “before taking any adverse action based . . . on the report, the person intending to take such adverse action shall provide to the consumer . . . a description in writing of the rights of the consumer under this subchapter.” 15 U.S.C. § 1681b(b)(3)(A) (2012).

227. *Long*, 903 F.3d at 325 (“[A]lthough they did not receive FCRA rights disclosures, they understood their rights sufficiently to be able to bring this lawsuit.”).

228. *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884 (7th Cir. 2017).

229. *Id.* at 886 (emphasis added).

230. *Id.* at 889.

231. *Robertson v. Allied Sols., LLC*, 902 F.3d 690, 699 (7th Cir. 2018).

by the FCRA causes plaintiffs to suffer the type of harm Congress intended to prevent—wrongful denial of employment.²³² This particular injury is the subject of the active split between the Third and Ninth Circuits.²³³ These circuits disagree over whether a concrete injury has occurred even if providing a copy of the report could not have changed the plaintiff's employment outcome.²³⁴

Two final cases arising under different statutes further flesh out standing for informational injuries. In *Hagy v. Demers & Adams*, the Sixth Circuit considered another FDCPA disclosure violation where a letter forgave the plaintiff's debt but "'fail[ed] to disclose' that it was a 'communication . . . from a debt collector.'" ²³⁵ Though the letter violated the explicit statute, it did no harm. In fact, the letter gave the plaintiff "peace of mind," leading the court to conclude that the plaintiff had failed to establish standing.²³⁶ Finally, the Eleventh Circuit held that a failure to punctually disclose satisfaction of a mortgage did not injure the plaintiff because it did not deny him any information—he "already kn[ew] that he ha[d] discharged his contractual obligation."²³⁷ These last two cases underline the importance of the D.C. Circuit's second element of an informational injury: the plaintiff must specifically identify an injury that resulted from the denial of information that they were statutorily due. That injury is best demonstrated with a counterfactual: if the plaintiff had *known*, they would have acted *differently*.

This taxonomy demonstrates that the *Spokeo* Court's attempt to clarify standing doctrine instead produced confusion and divergence in the lower courts. While some intangible harms consistently confer standing, others produce results that vary between courts and between similarly structured consumer protection statutes.

IV. PROPOSING DEFERENCE TO CONGRESS

This Note contends that courts should aim for uniformity by showing greater deference to Congress's articulation of injuries that are sufficient to confer standing.

The courts and Congress have several sweeping options that would allow plaintiffs to establish injury more consistently. Apart from other actions,²³⁸ judicial deference to congressional factfinding should be part of the

232. *Id.* at 699.

233. *See supra* Part II.

234. *Compare* Long v. Se. Pa. Transp. Auth., 903 F.3d 312, 323–24 (3d Cir. 2018), *with* Dutta v. State Farm Mut. Auto. Ins. Co., 895 F.3d 1166, 1176 (9th Cir. 2018).

235. 882 F.3d 616, 619 (6th Cir. 2018) (quoting 15 U.S.C. § 1692e(11) (2012)).

236. *Hagy*, 882 F.3d at 621, 623.

237. *Nicklaw v. CitiMortgage, Inc.*, 855 F.3d 1265, 1268 (11th Cir. 2017).

238. Courts could eliminate the injury-in-fact requirement entirely. *See Fletcher, supra* note 3, at 223; Sunstein, *supra* note 3, at 235–36. Alternatively, courts could return to the pre-*Spokeo* ante in which concreteness held little significance and injury in fact was simply a question of particularity. *See Rachel Bayefsky, Constitutional Injury and Tangibility*, 59 WM. &

solution. Congress's "power to define injuries and articulate chains of causation" has two major advantages when compared to judicial power.²³⁹ First, Congress has superior factfinding abilities in complex environments. Second, it is better equipped to adapt to social, political, and technological change.²⁴⁰

Identifying challenges in society and developing policy responses is the traditional realm of Congress. As an institution, it is well equipped to consider available evidence, solicit expert advice, and develop prospective responses to developing challenges.²⁴¹ The courts, by comparison, have relatively weak factfinding abilities, as demonstrated in Part III. For one, courts have treated risk-based harms inconsistently to the point of dismissing them.²⁴² In the series of post-*Spokeo* FACTA cases, judges' intuitions about likelihood of harm diverged from the judgment of Congress.²⁴³ The *Dutta-Long* split also cautions against making cut-and-dry risk determinations that depart from Congress's conclusions.²⁴⁴ Courts should be particularly hesitant about making decisive determinations on the likelihood of any particular harm occurring in complex environments, like in employer-employee relationships.²⁴⁵ Though courts should not treat Congress's identification of harms as decisive for purposes of standing, they similarly should not brashly dismiss the benefits of prophylactic procedural requirements.²⁴⁶

Independent of calculating risk, courts may also simply misunderstand the harms that result from particular statutory violations. Fact-gathering on standing issues is structurally limited by the fact that it is a jurisdictional in-

MARY L. REV. 2285, 2359–69 (2018). Congress, too, could act either by tying private rights of action to a cash bounty system or by vesting plaintiffs with a property right to confer a tangible interest in enforcing statutes. See Sunstein, *supra* note 3, at 232–35.

239. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring).

240. Daniel Townsend, *Who Should Define Injuries for Article III Standing?*, 68 STAN. L. REV. ONLINE 76, 82–83 (2015).

241. See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195–96 (1997) ("Congress[] . . . 'is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data' bearing upon' legislative questions. This principle has special significance in cases . . . concerning regulatory schemes of inherent complexity and assessments about the likely interaction of industries undergoing rapid economic and technological change." (citations omitted) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994))); Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 768 (2008) ("[T]he legislature's superior capacity to collect evidence—stemming from its committee system, larger staffs, and research arms—gives it a comparative advantage over the judiciary in the generalized factfinding that informs legislation."). But see Neal Devins, Essay, *Congressional Factfinding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1182 (2001).

242. See *supra* text accompanying notes 188–200.

243. See *supra* Section III.D.

244. See *supra* text accompanying notes 97–101.

245. Cf. *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 640 n.23 (3d Cir. 2017) ("Our conclusion that it was within Congress's discretion to elevate the disclosure of private information into a concrete injury is strengthened by the difficulty that would follow from requiring proof of identity theft or some other tangible injury.").

246. See *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016).

quiry and precedes any extensive discovery efforts.²⁴⁷ Notably, the Court itself fails to appreciate its narrow factfinding capabilities. One of the most-cited lines from *Spokeo* is the Court's dicta stating that an incorrect zip code is clearly "a bare procedural violation" resulting in no attendant concrete injury.²⁴⁸ Yet it is not difficult to identify harms that could result from an erroneous zip code. For example, research shows that employers discriminate against job applicants based on the zip codes that appear on their resumes.²⁴⁹ Reporting an incorrect zip code can lead to misdirected mail or even affect the credit options or prices for services available to consumers.²⁵⁰ After *Spokeo*, at least one district court held that reporting an inaccurate address *does* cause a concrete injury.²⁵¹ The *Spokeo* Court's judgment reveals a deeper failure to appreciate the extent to which "society runs on information, often through algorithmic calculations," such that nearly "*any* inaccuracy creates a material risk of tangible harm to consumers."²⁵²

Congress is also better positioned to align conceptions of injuries with cultural, political, and technological change. In FACTA cases, courts have repeatedly relied on prior case law discounting the risks of identity theft from the first six digits of a credit card number.²⁵³ Yet, as the Eleventh Circuit observed, the original basis for these claims was a single expert's opinion in 2007.²⁵⁴ Since then, hacking and identity theft technology has progressed significantly.²⁵⁵ Courts have a tendency to convert a contingent factual situation (like the relative security of a credit card number) into a hard-and-fast precedent.²⁵⁶ While the very nature of precedent binds subsequent courts,

247. See Townsend, *supra* note 240, at 82.

248. *Spokeo*, 136 S. Ct. at 1550; *see, e.g.,* Braitberg v. Charter Commc'ns, Inc., 836 F.3d 925, 930 (8th Cir. 2016); *Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 514 (D.C. Cir. 2016).

249. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 1003 (2004).

250. See Konnoth & Kreimer, *supra* note 52, at 60 n.102; Willis, *supra* note 41, at 241–42; *see also* Wu, *supra* note 50, at 459 ("[C]ollecting zip codes can lead to consumer privacy harms, such as receiving unwanted marketing or the sale of personal information to third parties.").

251. See *Gambles v. Sterling Infosystems, Inc.*, 234 F. Supp. 3d 510, 524 (S.D.N.Y. 2017) ("[T]he statements in Sterling's Report about Gambles's address history together cast him as itinerant, shiftless, and risky, thereby undermining his prospects for employment.").

252. Willis, *supra* note 41, at 242, 250.

253. See, e.g., *Katz v. Donna Karan Co.*, 872 F.3d 114 (2d Cir. 2017).

254. *Muransky v. Godiva Chocolatier, Inc.*, 905 F.3d 1200, 1213–14 (11th Cir. 2018) (citing *Bateman v. Am. Multi-Cinema, Inc.*, 252 F.R.D. 647, 651 (C.D. Cal. 2008), *rev'd*, 623 F.3d 708 (9th Cir. 2010)), *vacated*, 922 F.3d 1175 (11th Cir. 2019).

255. See, e.g., Bob Sullivan, *Identity Theft Is Skyrocketing, and Getting More Sophisticated*, MARKETWATCH (Feb. 27, 2018, 10:13 AM), <https://www.marketwatch.com/story/identity-theft-is-skyrocketing-and-getting-more-sophisticated-2018-02-27> [<https://perma.cc/A8MW-WMCB>].

256. Cf. Lyria Bennett Moses, *Recurring Dilemmas: The Law's Race to Keep Up with Technological Change*, 2007 U. ILL. J.L. TECH. & POL'Y 239, 265, 280–81 (observing that "[c]ommon law rules can become fossilized"); Townsend, *supra* note 240, at 82.

Congress can act on the basis of future risks and determine that they are sufficient to justify creation of a private cause of action.²⁵⁷

Statutory causes of action can also adapt to changing values. Because a single provision can further several interests simultaneously, courts should be wary of dismissing a plaintiff's alleged injury by narrowly construing the values at stake. The *Dutta-Long* split epitomizes the issue. In *Dutta*, the Ninth Circuit focused on the narrow interest of correcting inaccurate credit reports.²⁵⁸ By comparison, in *Long*, the Third Circuit emphasized other intangible interests of fairness, transparency, and an opportunity to tell one's story independent of any particular pecuniary outcome.²⁵⁹ The Third Circuit's approach assigns intrinsic value to procedure and is reminiscent of the work of Jeremy Waldron. Waldron argues that procedure is valuable not just for its results but also for its "dignitarian aspect: it conceives of the people who live under it as bearers of reason and intelligence."²⁶⁰ The Third Circuit also likened plaintiffs' injury to historical conceptions of privacy torts premised on "interference with an individual's ability to control his personal information."²⁶¹ This difference in approach not only better fulfills Congress's interests as communicated in statutory text but also better subscribes to *Spokeo*'s historical considerations.

The Third Circuit's *Long* opinion, however, also exhibits a perplexing vision of informational injuries. Though the court granted plaintiffs standing under the prior disclosure provision, it denied standing for SEPTA's failure to disclose plaintiffs' rights under the FCRA.²⁶² The court claimed that the plaintiffs were unharmed by SEPTA's oversight because they were informed of their rights by other means—evidenced only by the fact that they successfully filed suit against SEPTA.²⁶³ This conclusion seems to suggest, however, that a harm, or lack thereof, caused by a procedural interest can be inferred purely from the outcome. Such an inference conflicts with the court's prior claim that a disclosure requirement is not conditioned "on whether having the report would allow an individual to stave off an adverse" outcome.²⁶⁴ Like the Ninth Circuit in *Dutta*, the Third Circuit mistakenly overlooked other interests that Congress could have been protecting—like the assurance

257. But see David P. Fidler, *The Supreme Court Adapts Constitutional Law to Address Technological Change*, COUNCIL ON FOREIGN REL. (July 11, 2018), <https://www.cfr.org/blog/supreme-court-adapts-constitutional-law-address-technological-change> [<https://perma.cc/NR69-EKTC>] ("[E]xpecting Congress to keep law in pace with technology is wishful thinking.").

258. *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895 F.3d 1166, 1174–75 (9th Cir. 2018).

259. *Long v. Se. Pa. Transp. Auth.*, 903 F.3d 312, 319 (3d Cir. 2018).

260. Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *GETTING TO THE RULE OF LAW* 3, 19 (James E. Fleming ed., 2011).

261. *Long*, 903 F.3d at 324.

262. *Id.* at 325.

263. *Id.*

264. *Id.* at 319.

that unsophisticated consumers would not fall victim to deceptive practices or accidentally forgo their rights.²⁶⁵

There is also reason to believe that a deferential stance would simply produce more coherent doctrine. Deferring to congressional factfinding would help resolve three troubling doctrinal trends. First, deference would reduce the incentive for plaintiffs to launder intangible harms as tangible harms by seizing on trivial monetary losses.²⁶⁶ For example, consider what options are left to plaintiffs in Dutta's position. By narrowing the path for alleging a pure informational injury, the Ninth Circuit incentivizes standing arguments that pander to courts' apparent comfort with pecuniary harms. As the string of TCPA cases demonstrates, intangible harms are amenable to being reframed as, often trivial, tangible harms.²⁶⁷ Dutta's harms, for example, could be reframed as (1) the monetary cost of obtaining and printing one's own reports, (2) the time and inconvenience of disputing inaccuracies, not to mention (3) the cost of phone charges and electricity consumed in the process. Following cases like *Mey* or *Florence Endocrine*, these claims should have traction with lower courts, and would certainly fulfill an apparent desire to tie procedural violations to a tangible injury to the plaintiff. It is difficult to argue, however, that they would create a more satisfying basis for the underlying policy concerns that motivated Congress to write the FCRA in the first place.²⁶⁸

Second, deferring to Congress's articulation of intangible injuries would reduce the significance of the tangible–intangible divide altogether. As Rachel Bayefsky argues, “the line between tangible and intangible harm is not a deep-seated or clear-cut feature of empirical reality, but a contextually sensitive boundary.”²⁶⁹ When judges distinguish between the two, they inevitably invoke their own normative assumptions as seemingly “obvious” tangible harms are separated from the more complex intangible ones.²⁷⁰ For example, courts have disagreed on whether lost time is tangible or intangible in nature.²⁷¹ Similarly, informational injuries skirt the tangible–intangible divide, particularly when the information in question could determine a job applicant's employment.²⁷²

Finally, deferring to Congress would produce more consistent outcomes. Currently, a plaintiff's fate may hang on a court's readiness to engage

265. See *Macy v. GC Servs. Ltd. P'ship*, 897 F.3d 747, 758 (6th Cir. 2018).

266. Cf. Bayefsky, *supra* note 238, at 2310 (“Some courts have skirted debates about the cognizability of intangible harm by pointing to a tangible harm that a plaintiff had suffered.”).

267. See *supra* Section III.C.

268. Cf. 15 U.S.C. § 1681 (2012) (listing one of the statute's purposes as ensuring fairness, confidentiality, and equity, not vindicating trivial harms that attend informational inaccuracies).

269. Bayefsky, *supra* note 238, at 2291.

270. See *id.* at 2325, 2359.

271. See *supra* Section III.C.

272. See *supra* Part II.

in historical analogy. The outcome in *Muransky*, for example, differs from other circuits in large part because the Eleventh Circuit searched for more apt historical analogies to printing a customer's credit card information.²⁷³ FCRA cases, including the Ninth Circuit's treatment of *Spokeo* on remand, also demonstrate the extent to which outcomes are determined by how a harm is characterized.²⁷⁴

Ultimately, courts may simply be the wrong forum for determining which statutory causes of action are truly necessary to shelter individuals from concrete harms and which are merely superfluous procedural details. Deference to congressional identification of injuries in procedural rights cases could resemble rational basis review. Under rational basis review, a court upholds a law so long as there is a rational relationship between the chosen means and a legitimate interest.²⁷⁵ The law may be wrongheaded or trivial, but that judgment is for Congress to make, not the courts.²⁷⁶ A court should conclude that a statutory violation, enforceable by a private right of action, causes a concrete injury if a rational legislature could have concluded the procedural right was related to an actionable injury. Standing doctrine could remain unchanged in other contexts.²⁷⁷ The consumer protection laws highlighted in this Note may not be worth the trouble of enforcement, "[b]ut it is for the legislature, not the courts, to balance the advantages and disadvantages" of such policies.²⁷⁸ A deferential stance would produce fairer, more

273. Compare *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175, 1188–92 (11th Cir. 2019) (analogizing disclosure of the plaintiff's credit card expiration date to the tort of breach of confidence), with *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780–81 (9th Cir. 2018) (refusing to identify a cognizable privacy harm because the plaintiff's receipt was not disclosed to a third party), and *Crupar-Weinmann v. Paris Baguette Am., Inc.*, 861 F.3d 76, 81–82 (2d Cir. 2017) (examining the text of FACTA but not engaging in historical analogies to common-law privacy claims), and *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724, 727–28 (7th Cir. 2016) (considering only the statutory language of FACTA as well as the fact that no third party viewed the plaintiff's credit card expiration date). See also *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1070 (D.C. Cir. 2019) (Rogers, J., concurring in part) ("The vagueness of the 'close relationship' test leaves ample room for a court to reach either conclusion and therefore does little to advance the standing analysis here.").

274. See *supra* text accompanying notes 212–215.

275. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955).

276. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469–70 (1981).

277. See *Lee & Ellis*, *supra* note 34, at 225 ("The Court should acknowledge the primacy of congressional intent and recognize that it may require a different set of standing rules in the procedural rights context."). Like equal protection cases, standing could have two tiers with a more permissive standard when Congress has spoken clearly. See *id.* at 228.

278. *Williamson*, 348 U.S. at 487. For example, some argue that FACTA and the FDCPA are unfair to defendants. See Michael T. Morley, *Spokeo: The Quasi-Hohfeldian Plaintiff and the Non-Federal Federal Question*, 25 GEO. MASON L. REV. 577, 584–86 (2018). But the proper remedy for doing away with bad statutes is the electoral process, not the judiciary. *Williamson*, 348 U.S. at 488. In fact, Congress has already shown a willingness to modify these statutes when they produce perverse outcomes. See, e.g., The Credit and Debit Card Receipt Clarification Act of 2007, Pub. L. No. 110-241, 122 Stat. 1565 (2008) (codified at 15 U.S.C. § 1681n(d)).

predictable outcomes for those that Congress saw fit to protect. A court's faulty factual reasoning should not stand as a barrier to deserved relief.²⁷⁹

A deferential approach coheres with traditional justifications for standing doctrine. The most prominent justification for standing is respecting the separation of powers between branches.²⁸⁰ Yet consumer protection cases do not raise concerns of asserting general grievances—suits are filed against private companies and allege conduct as to particular plaintiffs.²⁸¹ The executive branch is neither conscripted into action nor relieved of its Take Care Clause duties.²⁸² Instead, capricious invalidation of congressional statutes raises far more pernicious separation-of-powers concerns.²⁸³ Courts also should not strictly construe *Spokeo* in order to manage caseloads and conserve judicial resources.²⁸⁴ First, as an empirical matter, predictions of flooding federal courtrooms with frivolous litigation are difficult to disprove.²⁸⁵ Second, conforming an explicitly constitutional doctrine to concern for judicial resources raises important issues of judicial legitimacy.²⁸⁶ Rather, Congress has authority in such areas of technocratic management and could allocate additional resources to the judiciary if necessary.²⁸⁷

Nor does greater deference to Congress necessitate abrogating *Spokeo*. In part, *Spokeo*'s holding is narrow in application. The opinion's open-textured language, requiring support of history and Congress, does not de-

(2012)) (amending FACTA to include a temporary safe harbor provision for printing expiration dates).

279. See Bayefsky, *supra* note 238, at 2315 (“[C]ourts deciding that a statutory violation poses no material risk of harm override congressional determinations that the likelihood of real harm was sufficiently grave to justify imposing a procedural requirement. It is unclear why courts are justified in taking this step.” (footnote omitted)).

280. See *supra* note 22 and accompanying text.

281. *Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1070 (D.C. Cir. 2019) (Rogers, J., concurring in part) (“FACTA lawsuits do not implicate traditional separation-of-powers concerns.”); Townsend, *supra* note 240, at 83; see also Sunstein, *supra* note 3, at 231 & n.300.

282. See U.S. CONST. art. II, § 3 (“[H]e shall take Care that the Laws be faithfully executed . . .”); Sunstein, *supra* note 3, at 216–18 (arguing that granting standing to private parties to challenge executive nonenforcement of laws does not implicate separation-of-powers concerns).

283. See Bayefsky, *supra* note 238, at 2355–56; Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 466–67 n.37, 501 (2008).

284. *Contra* Morley, *supra* note 278, at 597.

285. See Toby J. Stern, Comment, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377, 402 (2003) (“[T]he floodgates argument . . . is rarely . . . followed by a true analysis of the potential litigation of which it speaks.”). One should also weigh the benefits of additional actions that could, for example, deter bad actors and protect consumers. See Bayefsky, *supra* note 238, at 2357–58.

286. Vicki C. Jackson, *Standing and the Role of Federal Courts: Triple Error Decisions in Clapper v. Amnesty International USA and City of Los Angeles v. Lyons*, 23 WM. & MARY BILL RTS. J. 127, 177–78 (2014); see also Bayefsky, *supra* note 238, at 2356–57.

287. Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007, 1069–72 (2013) (noting the range of congressional options to manage judicial caseloads); Sohn, *supra* note 23, at 741 (“Congress, after all, is the ultimate guardian and trustee of judicial resources.”).

mand limiting standing to the extent that some lower courts have.²⁸⁸ On remand, the Ninth Circuit was able to reach its original outcome despite the Supreme Court's tightening of concreteness.²⁸⁹ The Third and Eleventh Circuits, too, have engaged in *Spokeo*'s two-factor analysis and identified injuries that reflect a pragmatic, dynamic understanding of intangible harms.²⁹⁰ Ultimately, *Spokeo*'s bare terms may simply exclude standing for statutory violations that have no rational connection to underlying harm—whether as defined by history²⁹¹ or by congressional judgment.²⁹² Where there is room for reasonable disagreement, a court should defer to Congress. *Spokeo*'s evident unmanageability also suggests that lower courts should, faithfully applying Court precedent, confine its reach.²⁹³ Courts should examine history and congressional judgment, but should not let the opinion's formalism obstruct the application of plain statutes. Finally, if courts cannot practically defer to Congress's superior judgment while faithfully following *Spokeo*, then the Court should revisit its decision.

CONCLUSION

Application of *Spokeo* in the lower courts has produced a confused, inconsistent standing doctrine. Outcomes for plaintiffs currently differ both across jurisdictions and across similar statutes. Arbitrary doctrine is particularly concerning for the federal system of consumer protection laws that relies on consumers to vindicate their own statutory rights. This Note has made two contributions. First, it sorted the various intangible harms that courts have identified in the wake of *Spokeo* into categories. In doing so, it highlighted areas of consistency, contradiction, and continued ambiguity. Second, it called for greater judicial deference to congressional factfinding. Deferring to Congress's statutory language would result in both more responsive and effective enforcement of consumer protection laws as well as a more coherent standing doctrine for the courts to apply.

288. See *supra* text accompanying notes 193–207.

289. *Robins v. Spokeo, Inc.*, 867 F.3d 1108, 1118 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 931 (2018).

290. See *Muransky v. Godiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019); *Long v. Se. Pa. Transp. Auth.*, 903 F.3d 312 (3d Cir. 2018).

291. See *Hagy v. Demers & Adams*, 882 F.3d 616, 621 (6th Cir. 2018) (finding no harm to plaintiff because a noncompliant letter gave plaintiff “peace of mind”); *Nicklaw v. CitiMortgage, Inc.*, 855 F.3d 1265, 1268 (11th Cir. 2017) (finding no harm because plaintiff was not deprived of any information as a result of defendant's violation).

292. A court could conclude, for example, that the TCPA has no rational connection to car accidents. *Contra* *Mey v. Got Warrant, Inc.*, 193 F. Supp. 3d 641, 648–49 (N.D. W. Va. 2016).

293. See, e.g., *supra* Parts II and III.